

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

BEVERLY CALIFORNIA CORPORATION,  
d/b/a YORK TERRACE NURSING CENTER  
a/k/a BEVERLY ENTERPRISES  
PENNSYLVANIA, INC. d/b/a  
YORK TERRACE NURSING CENTER

Employer

and

Case 4–RC–18564

DISTRICT 1199P, SERVICE  
EMPLOYEES INTERNATIONAL  
UNION, AFL-CIO-CLC

Petitioner

**SUPPLEMENTAL DECISION**

The issue in this case is whether the Supreme Court’s decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), requires reversal of the Board’s conclusion that the Employer’s Licensed Practical Nurses (LPNs) do not exercise independent judgment in assigning and directing the work of other employees. Upon review of the record, I find that the *Kentucky River* decision does not require reversal.

**Procedural History**

The Employer operates an 80-bed skilled nursing center (herein called the Nursing Center) in Pottsville, Pennsylvania. The Petitioner represents a unit of service and maintenance employees working at the Nursing Center. On February 27, 1995, the Petitioner filed the instant petition seeking to represent a separate unit of LPNs and graduate practical nurses (GPNs).<sup>1</sup> A hearing was held on March 17, 22 and 23, 1995, at which the Employer took the position that its LPNs and GPNs were supervisors within the meaning of Section 2(11) of the Act. Thereafter, on June 9, 1995, then-Regional Director Peter W. Hirsch (RD Hirsch) issued a Decision and Direction of Election, finding that the LPNs were employees, not supervisors. An election was conducted on July 7, 1995, and the ballots were impounded. The Employer sought Board review of the Decision and Direction of Election, which was granted on April 30, 1996. On August 27,

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<sup>1</sup> The parties stipulated at the 2002 hearing that the Employer has not employed any GPNs for several years. GPNs performed the same duties as LPNs.

1996, the Board affirmed RD Hirsch's conclusion that the LPNs were not supervisors. The ballots were counted on September 12, 1996, and the Tally of Ballots showed that a majority of the unit voted in favor of representation. The Petitioner was certified as the representative for the LPNs on September 23, 1996.

The Employer refused to bargain, and on December 30, 1996, the Petitioner filed a charge in Case 4-CA-25579, alleging that the refusal to bargain was unlawful. A Complaint issued based on the charge, and the Acting General Counsel filed a Motion for Summary Judgment on September 21, 1998. The Board granted the Motion on November 16, 1998 and ordered the Employer to bargain.

Thereafter, on May 29, 2001, the United States Supreme Court issued its decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), in which it rejected the standard used by the Board in evaluating whether alleged supervisors exercised independent judgment in assigning and responsibly directing other employees. On August 3, 2001, the Board issued a Notice to the parties indicating that it had decided to reconsider its conclusions regarding the supervisory status of the Employer's LPNs in light of the Supreme Court's decision. On October 24, 2001, the Board issued a Supplemental Decision and Order in which it vacated its Decision and Order in Case 4-CA-25579, reopened the record in this case, and remanded the matter to the undersigned for, "further consideration and to take additional evidence on the issue of whether the Employer's licensed practical nurses and graduate practical nurses 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority." On December 5, 2001, the undersigned Regional Director issued an Order reopening the record, and a hearing on the issues specified in the remand was held before Hearing Officer Charles S. Strickler on January 8, 2002.<sup>2</sup> Both parties submitted post-hearing briefs.

This Supplemental Decision is based on the record of both the original hearing held in 1995 and the additional hearing conducted in 2002. Because of the restricted nature of the remand, this decision is limited to the question of whether the Employer's LPNs assign and responsibly direct the work of other employees and does not revisit the other asserted indicia of supervisory status resolved in the earlier decision, including disciplinary authority and the responsibility to prepare performance evaluations. This decision also does not consider the Employer's argument that the Petitioner's certification should be revoked because of the passage of time since the 1995 representation election, as this issue is beyond the scope of the remand.

## **Facts**

### *Background*

The Nursing Center is run by the Administrator, a position currently held by Arlene Postupak. Johnna Pepe served as the Director of Nursing (DON) in 1995, and Julie Jones currently holds the position. The Assistant Director of Nursing (ADON), currently Kris Burns, reports to the DON. The DON is present at the facility from 8:30 a.m. until between 5 p.m. and

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<sup>2</sup> The rulings made by Hearing Officer Strickler are free from prejudicial error and are hereby affirmed.

8 p.m. Monday through Friday, and the ADON is present on weekdays from 8:30 a.m. to about 4 p.m.<sup>3</sup>

In addition to the DON and ADON, the Nursing Department includes Registered Nurses (RNs), LPNs, and Certified Nursing Assistants (CNAs). The CNAs are included in the service and maintenance unit represented by the Petitioner. In 1995, the Employer employed approximately 33 CNAs, 8 LPNs, and 11 RNs. It presently employs about 40 CNAs, 6 LPNs, and an unspecified number of RNs. All of the LPNs and most of the RNs serve at times as charge nurses.<sup>4</sup> The RNs, LPNs, and CNAs generally work on three shifts, which run from 7 a.m. to 3 p.m. (day shift), 3 p.m. to 11 p.m. (evening shift), and 11 p.m. to 7 a.m. (midnight shift).

The Nursing Center is divided into two units called Rosewood Terrace and Rainbow Terrace. Rosewood Terrace can accommodate up to 48 residents, and Rainbow Terrace has room for up to 32 residents. A charge nurse, who may be either an LPN or an RN, is assigned to each unit on each shift. An RN normally serves as the charge nurse on Rainbow Terrace on the day and midnight shifts. An LPN usually acts as the charge nurse on Rainbow Terrace on the evening shift, and an LPN is assigned as the charge nurse for Rosewood Terrace on all three shifts. Four CNAs are typically assigned to Rainbow Terrace on the day shift, two or three CNAs work on Rainbow Terrace on the evening shift, and two CNAs are assigned to Rainbow Terrace on the midnight shift. For Rosewood Terrace, six CNAs are assigned to the day shift, four CNAs are assigned to the evening shift, and two CNAs are scheduled on the midnight shift.

The Employer is required by state law to have an RN present at the Nursing Center at all times. To satisfy this requirement, the Employer assigns an RN to the evening shift. An extra RN is also assigned to weekend day shifts. These weekend and evening shift RNs have responsibility for both units.

### *Job Descriptions*

The charge nurse job description<sup>5</sup> indicates that the charge nurse is, “responsible for the supervision of the delivery of care to a group of residents on a nursing unit with the direction of the RN/LPN RCC/Nurse Manager and under the overall responsibility to the Director of Nursing Services . . .” According to the job description, charge nurses counsel and set goals for assigned staff in providing quality resident care; adjust daily assignments in conjunction with resident care needs and assigned staff’s strengths; are accountable for the delivery of care through supervision of assigned staff; assign nursing assistants specific duties for residents’ care; assign hours, breaks and meal periods to CNAs; ensure proper staffing by calling in replacement associates for CNAs not reporting for work and by transferring or reassigning CNAs for proper coverage; and revise work schedules of CNAs as necessary. The CNA job description indicates

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<sup>3</sup> This decision assumes that the Nursing Center’s operations remain as described in 1995 except where the record of the hearing held in 2002 indicates that there have been changes.

<sup>4</sup> One of the RNs is a treatment nurse who works on weekdays from 9 a.m. to 1 p.m. dispensing medications and other treatments throughout the Nursing Center. The record is not clear as to whether the Employer regards this treatment nurse as a charge nurse.

<sup>5</sup> The charge nurse job description placed in evidence in 2002 is substantially similar to the 1995 job description.

that CNAs work under the supervision of “licensed nursing personnel” and report to the unit charge nurse. The Employer has also issued other documents to its employees indicating that charge nurses are considered to be supervisors and are responsible for assigning work to CNAs.<sup>6</sup>

### *Scheduling of CNAs*

In 1995, the DON was primarily responsible for assigning CNAs to shifts and units, but ADON Kris Burns currently holds this responsibility. Burns normally prepares daily “deployment sheets” specifying the units to which CNAs will be assigned.<sup>7</sup> DON Jones testified, however, that she sometimes personally fills out the sheets and an RN or LPN charge nurse also performs this function at times. The only example of an LPN performing this task is that LPN Kristin Krusnoski completed 17 deployment sheets in October and November 2001 at Burns’ request because Burns did not have time to complete them herself. Krusnoski could not recall any other occasion when she prepared deployment sheets during her seven years of employment at the Nursing Center. She testified, however, that employees other than RNs have completed these sheets, and she observed CNAs prepare them at least twice. When Krusnoski filled out the deployment sheets, she shifted employees between units on several occasions and used seniority as the basis for deciding which CNA to switch. CNAs perform similar work regardless of the unit to which they are assigned.

CNAs are sometimes reassigned from one unit to the other following the start of a shift to fill in for absent workers. At the 1995 hearing, former DON Pepe testified that charge nurses decided whether to shift CNAs to correct staffing imbalances, although she admitted that the nurses on day and evening shifts might consult with her before shifting employees. Pepe also indicated that a rotation was normally used to determine which CNA would move between units. The only witness to support Pepe’s claim that charge nurses were involved in moving employees between units was RN Linda Hasara. Hasara claimed she sometimes asked the LPN charge nurse responsible for the other unit if she had CNAs who could be shifted, and the LPN decided whether to move the CNAs and determined whom to transfer. Several other witnesses at the 1995 hearing testified, in contrast, that on all three shifts, CNAs switched units on their own or were switched by the DON or an RN charge nurse.<sup>8</sup> The only witness to testify about such reassignments at the 2002 hearing was LPN Krusnoski, who indicated that the CNAs themselves choose who will transfer.

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<sup>6</sup> An unnamed document given to employees in May 1995 stated that the Employer considers, “all of our Charge Nurses to be part of our facility’s management team” and that they “have the responsibility for assigning work to our nursing assistants,” among other supervisory functions. The Employer distributed a second document entitled “Acknowledgment of Supervisory Duties and Responsibilities for LPN and RN Charge Nurse,” which also indicates that charge nurses have the authority to perform a variety of supervisory functions.

<sup>7</sup> The deployment sheets also indicate which CNAs are responsible for training or orienting new employees.

<sup>8</sup> Thus, CNA Gail Barone testified that CNAs on the midnight shift requested and received assistance from employees on the other unit without any intervention by the charge nurses assigned to the shift. Day shift LPN Brown indicated that the RN charge nurse on that shift was responsible for deciding whether employees should be moved between units. LPN Millie Bealer noted that DON Pepe was present at the start of the evening shift and decided whether CNAs needed to be reassigned. LPNs Kristin Yonchuck and Debra Shiner both testified that evening-shift CNAs drew lots to determine who would transfer.

When it is impossible to compensate for staffing shortages by shifting employees between units, extra employees from other shifts are asked to work. The collective-bargaining agreement covering employees in the service and maintenance unit sets forth a detailed procedure to be followed for determining which CNAs are selected to work overtime.<sup>9</sup> Several LPNs at the 1995 hearing testified that their only role was to solicit volunteers occasionally at the request of an RN and that either the DON, ADON or an RN was responsible for deciding whether CNAs would work overtime.<sup>10</sup>

RN Hasara testified in 1995 that LPNs informed her that they permitted CNAs to leave work early due to illness,<sup>11</sup> but she stated that CNAs requesting to leave were often referred by the charge nurse to the DON or ADON when those individuals were present. Two LPNs testified that they referred any CNA requests to leave to the RNs working on their shifts.

The collective-bargaining agreement entitles CNAs to paid breaks and an unpaid meal period. CNAs normally take lunches and breaks at established times that may be altered by charge nurses when necessary to meet operational needs. Some CNAs tell LPNs each time they leave for breaks, but others only do so if they take their breaks at unscheduled times.

#### *Assignment of Patients and Duties to CNAs*

The two units at the Nursing Center are divided into sections consisting of equal numbers of residents who live in adjacent rooms. The Nursing Center does not group residents based on their physical condition or the difficulties involved in providing them with care.

Former DON Pepe indicated in 1995 that charge nurses assigned CNAs to sections for two-week periods based on a pre-established rotation. Pepe claimed the rotation could be altered based on resident requests, the charge nurses' assessment of how well CNAs assigned to adjacent areas worked together, or various other factors. She stated that charge nurses often consulted with CNAs before altering section assignments but did not do so in every case.

The other witnesses who appeared at the 1995 hearing described a more limited role for charge nurses in making section assignments. They testified that CNAs were assigned to sections based on a pre-set rotation with no charge nurse involvement unless staff shortages made it necessary to redivide sections.<sup>12</sup>

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<sup>9</sup> Thus, the agreement requires employees wishing to work overtime to place their names on a list, and employees on the list are offered overtime based on seniority. If no employee on the list accepts the offer, the Employer seeks volunteers, and if this effort is unsuccessful, overtime may be assigned to the least senior available employee.

<sup>10</sup> The Employer introduced into evidence call-in sheets completed by LPN Christine Roland showing she contacted CNAs in an effort to find employees to work overtime. These documents are consistent with the LPNs' testimony that they were sometimes asked to make such contacts and do not establish that it was Roland who decided on those occasions that overtime was necessary.

<sup>11</sup> She did not identify the LPNs who made such reports.

<sup>12</sup> CNA Gail Barone and LPN Roland testified at the 1995 hearing that the two CNAs assigned to each unit on the midnight shift work together in providing care to all of the residents in the unit while on the day and evening shifts, one CNA is assigned to each section of residents.

DON Jones testified in 2002 that CNAs usually select sections on their own, but charge nurses may help resolve disagreements among the CNAs or alter CNA selections to accommodate resident requests or to avoid having inexperienced employees handle difficult residents. LPNs Krusnoski and Rapoli and CNA Barone all testified, however, that CNAs select sections entirely on their own. Rapoli stated that she never alters CNA selections, and Barone testified that charge nurses become involved only if CNAs cannot agree on the assignments.

Most of the care provided by CNAs is routine and does not vary from resident to resident. Some additional assignments are given to CNAs based on the section to which they are assigned. Thus, the CNA working one section might be required to fill ice pitchers, and the CNA in another section might remove the trash. Pepe testified that a charge nurse might reallocate such duties if resident care responsibilities prevented the employee originally assigned from completing the task.

Some individuals require care beyond the routine care provided for all residents. For example, if a resident becomes ill, it may be necessary to check his or her vital signs on a regular basis or to make special efforts to encourage the resident to consume fluids. Other residents must be bathed with special soaps, encouraged to walk, or rested at specified intervals. Much of this additional care is dictated by physician orders or a care plan developed for each resident by the Employer's nursing staff, but the charge nurses sometimes determine on their own that special care is required. LPN Susan Ann Brown estimated that 98% of the instructions for special care were derived from physician orders or care plans with the remainder originating with the charge nurse.

The CNA assigned to the section in which the resident requiring the care is located normally performs the additional care. Charge nurses inform CNAs of any extra care which must be provided to specific residents. In 1995, these additional duties were included on CNA assignments sheets. The assignment sheets were since abandoned, and special care instructions are now communicated verbally to CNAs by the charge nurse at the start of each shift.

Residents are sometimes required to leave the Nursing Center for physician appointments, and a CNA is assigned to accompany them. The CNA assigned is normally the individual working the section in which the resident is located. If a CNA cannot accompany a resident, the charge nurse seeks a volunteer to go on the outing. If no volunteer is forthcoming, the charge nurse uses a rotation to assign a CNA.

### *Monitoring CNA Work*

While CNAs generally know what to do, charge nurses make rounds of their units to ensure that residents are receiving proper care. They monitor the CNAs' work and ask them to repeat a task if it is not done properly.

In 1995, the Employer introduced into evidence at the hearing minutes of meetings with its nurses at which nursing management gave instructions concerning the manner in which CNAs

were to perform their jobs. The minutes of a meeting held in June 1993, for instance, indicate that charge nurses were told: not to bathe residents in shower chairs; to be certain they provided mouth care for residents three times daily; and to monitor CNA assignments more closely to ensure that five residents had been dressed by the time the midnight shift ended. The minutes of a November 1994 meeting show that evening shift charge nurses were told to monitor for verbal abuse of residents by CNAs and to report such incidents to the Nursing Office.

### *Miscellaneous*

CNAs receive annual written performance evaluations. One of the categories in which they are currently evaluated is, “follows directions and assignments from Nurses.” An evaluation prepared by LPN Krusnoski in August 2000 indicates that a CNA, “always follows directions and assignments given to her by the nurses” and “always is willing to do extra work for the charge nurses.”

CNAs have been disciplined based on reports from LPN charge nurses indicating that they failed to follow charge nurse instructions. LPN Brown testified at the 1995 hearing that she spoke to CNAs about minor infractions such as failure to respond quickly to a resident’s requests or to distribute meals promptly. Four LPNs testified that they reported CNAs’ poor performance or failure to follow instructions to the DON. The record includes several examples of discipline given to CNAs as a result of LPN reports of poor work.<sup>13</sup>

An LPN who receives a telephone call from an employee indicating the employee will be absent is required to complete a form noting that she received the call.

## **Analysis**

### *Legal Standard*

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); (2) their exercise of such

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<sup>13</sup> Thus, a CNA was given an oral warning for failing to comply with instructions from LPN Anne Marie Mistishen to apply hand restraints to a resident. A warning was issued to a CNA for failing to follow LPN Shiner’s instructions to remove a resident from a bedpan. Another CNA was disciplined on several occasions based on reports by LPN Shiner about her failure to perform her duties properly. A CNA was given a written warning in July 1998 for failing to heed LPN Rapoli’s order to clean a resident and a second warning in February 2000 for ignoring instructions from Rapoli to return to her unit. In April 1997, a CNA was issued a written warning for failure to honor LPN Krusnoski’s demand that she clean a resident’s pajamas. A CNA was given two warnings in January 2000 for ignoring instructions from Krusnoski to refrain from taking unauthorized breaks. The second of these warnings specifically noted that “failing to obey a direct order” from a charge nurse is “insubordination which can lead to termination.”

authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, *supra*, 532 U.S. at 712; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

In *Kentucky River*, the Court decided, contrary to the Board, that RNs at a residential care facility were supervisors within the meaning of the Act. In determining that the nurses were not supervisors, the Board had found, *inter alia*, that while they directed the work of aides, this direction did not involve independent judgment because it was by virtue of the nurses' training and experience, not because of their connection with management. The Court acknowledged that the "term 'independent judgment' was ambiguous with respect to the degree of discretion required for supervisory status" and recognized that it was "within the Board's discretion to determine, within reason, what scope of discretion qualifies." *Id* at 1867. The Court rejected the Board's analysis, however, because the Board erroneously excluded, "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards" from the statutory definition of independent judgment, even where the employees exercised a sufficient degree of discretion that would otherwise warrant a supervisory finding. In all other respects, the Court left intact the Board's traditional role in drawing the line between the performance of functions which are clerical and routine and assignment and direction that involve a sufficient element of discretion to confer supervisory status.<sup>14</sup>

Unlike *Kentucky River*, the original decision in this case was not based on the exclusion of "ordinary professional or technical judgment" in directing the CNAs. Rather, in finding the LPNs were not supervisors, the decision determined that the Employer had failed to meet its burden to demonstrate that the LPNs exercised significant discretion in assigning and directing employees. Specifically, based on the evidence adduced at the 1995 hearing, this decision found that LPNs had a lack of discretion in making work assignments, which were promulgated primarily by DON Pepe. The decision further indicated that reassignments of CNAs from one unit to another were based on a pre-established rotation list, not by a consideration of employees' relative skills and abilities. Overall, the decision found that, "none of the assignments by the LPN charge nurses involve the exercise of independent judgment necessary to confer supervisor status." The decision also stated that while the LPNs monitor CNAs' work, direct that they redo incorrect work, and report persistent errors to higher management, this authority has been held by the Board not to be an indication of supervisory status.<sup>15</sup>

The Employer again contends that the evidence indicates that LPNs at the Nursing Center assign and responsibly direct the work of CNAs in a manner sufficient to make them statutory supervisors. Upon further review of the 1995 record, as supplemented by evidence from the 2002 hearing, however, it remains clear that the Nursing Center's LPNs do not exercise a

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<sup>14</sup> The Court further suggested that the Board might "offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees" as Section 2(11) requires. *Id* at 871.

<sup>15</sup> In this regard, the decision cited *Control Services, Inc.*, 314 NLRB 421, 431 (1994) and *Phelps Community Medical Center*, 295 NLRB 486 (1989).



sufficient degree of discretion in assigning or directing other employees to render them supervisors.

### *Job Descriptions*

Although the LPN job descriptions and other documents issued by the Employer state that the LPNs schedule and assign work to the CNAs, it is settled that paper authority is not sufficient to confer supervisory status; there must be evidence of actual performance of supervisory functions. *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978). Nothing in the *Kentucky River* opinion undercuts this principle. Accordingly, it is necessary to analyze how the LPNs actually carry out their responsibilities.

### *Scheduling of CNAs*

ADON Burns normally completes the deployment sheets assigning CNAs to units. The only concrete example of an LPN preparing these sheets was when LPN Krusnoski completed them during the fall of 2001 because the ADON was busy with other duties. However, other employees including CNAs have also completed these sheets, and the only factor Krusnoski used in determining unit assignments was CNA seniority. Thus, at most, the Employer has demonstrated that LPNs sporadically assign CNAs to units, and on those occasions they rely on routine factors in making the assignments.

Break and meal periods are predetermined based on employee section assignments, and LPNs become involved only if a break must be delayed due to operational needs. The Board has characterized the ability to delay breaks due to workload as a “routine clerical judgment” and determined that the performance of this function does not establish supervisory status. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). See also *Loyalhanna Care Center*, 332 NLRB No. 86 (2000).

The evidence indicates that CNA requests to leave early are generally referred to an RN, or to the DON or ADON if they are present. Further, even if the LPNs had the authority to permit CNAs to leave early due to illness, the Board has characterized the exercise of such authority as routine and found it does not establish supervisory status. *Azusa Ranch Market* *supra*, at 812.

Although former DON Pepe testified in 1995 that LPNs decided whether to reassign or call in extra workers to cover staffing shortages, the LPNs all testified that any decision to transfer employees or bring in extra workers was reserved for the RNs. Moreover, a procedure detailed in the collective-bargaining agreement establishes which employees will be asked or required to work in the event of a staffing shortage, and the LPNs’ role is limited to contacting employees to solicit volunteers. In any case, the Board has consistently held that the ability to transfer or call in workers based on staffing shortages requires routine, not independent, judgment. *Parkview Manor*, 321 NLRB 477, 478 (1996); *Lakeview Health Home*, 308 NLRB 75, 79 (1992).

### *Assignment of Patients and Duties to CNAs*

In 1995, LPNs did not normally assign sections of patients to CNAs; these assignments were either based on a pre-established rotation or left to the CNAs. In 2002, CNAs generally choose their sections themselves, and charge nurses only intervene when CNAs cannot agree on assignments. While DON Jones testified that charge nurses sometimes overrule CNA selections based on resident needs or preferences, no other witness supported this testimony. Thus, there is insufficient evidence demonstrating that charge nurses use independent judgment in making section assignments. The Board generally views assignments made to equalize work or based on obvious variations in employee skill levels as not involving a degree of discretion sufficient to confer supervisory status. See, e.g., *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997); *Providence Hospital*, 320 NLRB 717, 727 (1996). The Supreme Court's *Kentucky River* decision plainly suggests that it is within the Board's discretion to make such a judgment.

No discretion is involved in selecting a CNA to accompany a resident on outings, as this assignment normally goes to the CNA assigned to the section in which the resident is located. If this CNA cannot go, the charge nurse will solicit volunteers and then, if necessary, resort to a rotation. Thus, these assignments do not involve sufficient independent judgment to confer supervisory status.

The LPNs may decide that additional care duties are required for particular residents, but the assignment of those tasks to the CNA otherwise responsible for the resident involves no exercise of discretion. The Board has cautioned about the importance of distinguishing between the exercise of independent judgment in determining that a function must be performed and the exercise of independent judgment in deciding who should perform the function. Supervisory status will be found only where judgment is exercised in making the assignment. *Ten Broeck Commons*, 320 NLRB 806, 811 (1996). The Supreme Court's opinion does not compel a different conclusion, as the Court held only that the Board could not distinguish between professional and technical and other forms of judgment in determining whether discretion was involved in the exercise of the supervisory functions listed in Section 2(11) of the Act. The decision did not undercut the notion that supervisory status will be found only where judgment is exercised in performance of a supervisory function and not in situations where an individual gives routine instructions to other employees in an effort to complete a work function whose development required the exercise of discretion. Therefore, the LPNs' decision that additional care is needed does not constitute the exercise of independent judgment in a Section 2(11) function.

### *Monitoring Work*

LPN charge nurses monitor the work of the CNAs assigned to their areas, require work to be repeated if it is not done properly, speak to CNAs about their performance, and report employees with persistent deficiencies to higher level management. These reports may result in discipline to the CNAs. As noted in the earlier decision, the Board has consistently held that no exercise of independent judgment is involved in checking the work of other employees and calling deficiencies to their attention. *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, JD slip op. at 36 (2001); *Ten Broeck Commons*, *supra*, at 811. The Board has also stated that reporting incidents of unacceptable work performance is not enough to make an individual a

supervisor. See, e.g., *Ten Broeck Commons*, *supra*, at 812. In *Beverly Health & Rehabilitation Services*, *supra*, at fn. 3, the Board concluded that the Supreme Court's *Kentucky River* decision did not require it to abandon these long held positions. I therefore find that the role played by the LPNs in checking work of other employees does not make them supervisors.

## **Conclusion**

In short, I do not believe the *Kentucky River* decision impacts the earlier decision's conclusions regarding the degree of judgment exercised by LPN charge nurses in assigning work to other employees or directing the performance of their work. I therefore find that the LPN charge nurses do not exercise sufficient discretion in assigning and directing work to be classified as supervisors, and I adhere to the earlier decision.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **August 5, 2002**.

Signed: July 22, 2002

at Philadelphia, PA

/s/

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DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four

177-8520-4700

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